Public Prosecutor v Dato' Sri Mohd Najib bin Hj Abdul Razak

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL BIL(L)-71–03 OF 2019
RICHARD MALANJUM CHIEF JUSTICE, ZAHARAH IBRAHIM CJ (MALAYA), DAVID WONG CJ (SABAH AND SARAWAK), RAMLY ALI, TENGKU MAIMUN, IDRUS HARUN AND NALLINI PATHMANATHAN FCJJ
10 APRIL 2019

Criminal Procedure — Appeal — Appeal against decision of Court of Appeal — Appointment of counsel as deputy public prosecutor — Whether letter of appointment of counsel required to be produced and shown — Whether respondent possessed legitimate expectation — Whether appointment protected by solicitor-client communication rule — Whether letter of appointment of counsel necessary document related to charge

This was an appeal by the public prosecutor against the decision of Court of Appeal where the learned judges found that the public prosecutor was required to produce and show the letter of appointment of Datuk Hj Sulaiman Abdullah ('Datuk Hj Sulaiman'), an advocate and solicitor of the High Court of Malaya, to lead the prosecution of the appellant in respect of seven charges preferred against the respondent under three different legislations, to wit, the Penal Code, the Malaysian Anti-Corruption Commission Act 2009 and the Anti-Money Laundering, Anti-Terrorism Financing and Proceedings of Unlawful Activities Act 2001. The public prosecutor had complied with the order of the Court of Appeal which required the letter of appointment be produced within three days from the date of order. However, it should be made clear that the public prosecutor's compliance with the order of the Court of Appeal was without prejudice to this appeal as made clear by the public prosecutor to the respondent.

Held, allowing the appeal, setting aside the order of the Court of Appeal and reinstating the order of the High Court:

(1) There was no difference whatsoever in conceptual terms in the appointment of Datuk Hj Sulaiman with that of an appointment of a counsel by a private entity to act on its behalf. To say that because the appellant happened to be a public figure, being the public prosecutor and with a paramount duty to act fairly, the respondent possessed a legitimate expectation was, with respect, misconceived. It was trite that whether legitimate expectation existed depended on the circumstances of each case and the circumstances in this case was not such that there existed

such right. Unless there was a challenge to the validity to the appointment of the counsel, there existed no duty on the appointing authority or private entity to produce the letter of appointment (see paras 11–12).

(2) Privileged communication between solicitors — client started when discussion among the respective parties was held as to whether a particular counsel should be appointed (see para 13).

(3) The public prosecutor was obliged to produce documents which were necessary to the charge prior to the commencement to prosecution. How a letter of appointment of a counsel was a 'necessary' document for prosecution of a case was hard to comprehend as it did not in any way relate to the charge preferred against the respondent. It was completely unrelated to the charge (see para 14).

[Bahasa Malaysia summary

Ini adalah rayuan oleh pendakwa raya terhadap keputusan Mahkamah Rayuan di mana hakim-hakim yang bijaksana mendapati pendakwa raya dikehendaki mengemukakan dan menunjukkan surat pelantikan Datuk Hj Sulaiman Abdullah ('Datuk Hj Sulaiman'), seorang peguambela dan peguamcara Mahkamah Tinggi Malaya, untuk mengetuai pihak pendakwaan berkenaan dengan tujuh pertuduhan yang dikenakan terhadap responden di bawah tiga undang-undang yang berbeza, iaitu, Kanun Keseksaan, Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 dan Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001. Pendakwa raya telah mematuhi perintah Mahkamah Rayuan yang memerlukan surat pelantikan dibuat dalam masa tiga hari dari tarikh perintah tersebut. Walau bagaimanapun, perlu dijelaskan bahawa pematuhan pendakwa raya terhadap perintah Mahkamah Rayuan tidak menjejaskan rayuan ini seperti yang dijelaskan oleh pendakwa raya kepada responden.

Diputuskan, membenarkan rayuan, mengetepikan perintah Mahkamah Rayuan dan mengembalikan semula perintah Mahkamah Tinggi:

(1) Tiada apa-apa perbezaan dari segi konsep dalam pelantikan Datuk Hj Sulaiman dengan pelantikan seorang peguam oleh entiti persendirian untuk bertindak bagi pihaknya. Untuk menyatakan bahawa oleh kerana perayu adalah tokoh masyarakat, sebagai pendakwa raya dan dengan kewajipan yang paling utama untuk bertindak dengan adil, responden mempunyai jangkaan sah, dengan hormat, salah tanggap. Adalah mantap bahawa sama ada jangkaan sah wujud bergantung kepada keadaan setiap kes dan keadaan dalam kes ini tidak terdapat hak tersebut. Kecuali terdapat satu bantahan untuk kesahihan pelantikan peguam tersebut, tiada kewajipan autoriti atau entiti persendirian yang dilantik untuk mengeluarkan surat perlantikan (lihat perenggan 11–12).

(2) Komunikasi terlindung antara peguam — klien bermula apabila perbincangan di antara pihak diadakan berkenaan sama ada seorang peguam tertentu harus dilantik (lihat perenggan 13).

(3) Pendakwa raya diwajibkan untuk mengeluarkan dokumen yang diperlukan untuk pertuduhan sebelum permulaan pendakwaan. Bagaimana surat pelantikan seorang peguam adalah dokumen 'perlu' untuk kes pihak pendakwaan adalah sukar untuk difahami kerana ia tidak dengan apa-apa cara berkaitan dengan pertuduhan yang dikenakan terhadap responden. Ia sama sekali tidak berkaitan dengan pertuduhan (lihat perenggan 14).]

Notes

For cases on appeal against decision of Court of Appeal, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 501–502.

Cases referred to

More v Weaver [1928] 2 KB 520, CA (folld)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceedings of Unlawful Activities Act 2001
Criminal Procedure Code ss 51, 129, 379
Courts of Judicature Act 1964 s 78(1)
Evidence Act 1950 s 55, 126
Interpretation Acts 1948 and 1967 s 55
Malaysian Anti-Corruption Commission Act 2009
Official Secrets Act 1972 s 16A
Penal Code

Tommy Thomas (Manoj Kurup, Sulaiman Abdullah, Donald Joseph Franklin and Muhd lzzat Fauzan with him) for the appellant.
Muhammad Shafee Abdullah (Harvinderjit Singh, Sarah Maalini Abishegam, Al-Firduas Shahrul Naing, Wan Aizuddin Wan Mohammed, Rahmat Hazlan, Muhammad Farhan Muhammad Shafee, Syahirah Hanapiah and Zahria Eleena with him) (Shafee & Co) for the respondent.

David Wong CJ (Sabah and Sarawak) (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the public prosecutor against the decision of Court of Appeal where the learned judges found that the public prosecutor is required to produce and show the letter of appointment of Datuk Hj Sulaiman Abdullah ('Datuk Hj Sulaiman'), an advocate and solicitor of the High Court

of Malaya, to lead the prosecution of the appellant in respect of seven charges preferred against the respondent under three different legislations, to wit, the Penal Code, the Malaysian Anti-Corruption Commission Act 2009 and the Anti-Money Laundering, Anti-Terrorism Financing and Proceedings of Unlawful Activities Act 2001.

[2] The public prosecutor had complied with the order of the Court of Appeal which required the letter of appointment be produced within three days from the date of order, that is, 25 March 2019. However, it should be made clear here that the public prosecutor's compliance with the order of the Court of Appeal was without prejudice to this appeal as made clear by the public prosecutor to the respondent.

BACKGROUND FACTS

[3] The respondent had taken out a motion for the following reliefs:

> Prayer1
>
> The Applicant seeks an order from this Honourable Court to compel the Respondent to produce Datuk Haji Sulaiman bin Abdullah's letter of appointment and copies of any other authorization in writing executed by the Respondent in relation to his appointment as a Deputy Public Prosecutor within 3 days from the date of the order;
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> Prayer2
>
> The Applicant be provided with copies of the letter of appointment and documents produced by the Respondent pursuant to Prayer I;and
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> The Applicant seek any further and/or other order, relief or direction which this Honourable Court may deem fit and proper in the circumstances.

HIGH COURT

[4] The learned judge from the outset after looking at the motion and the supporting and opposing affidavits held that the crux of the motion is not so much as to challenge the validity of the appointment of Datuk Hj Sulaiman but only for production of the said letter of appointment.

[5] The learned judge refused to sustain the prayers in the aforesaid motion premised on the following grounds:

(a) the letter of appointment does not fall within the ambit of s 51 of the Criminal Procedure Code which covers documents relating to the charge against the appellant;

(b) there is no requirement in law to produce the letter of appointment of Datuk Hj Sulaiman when there is no challenge to the appointment,

hence the court cannot compel its production solely on the ground that the attorney general had refused to produce it;

(c) the media release from the public prosecutor himself, in the person of the learned attorney general, dispenses the need to produce the same in court; and

(d) the letter of appointment has been classified as official secret by the issuance of a certificate under s 16A of the Official Secrets Act 1972. But this point was not taken up in the Court of Appeal nor in this court.

THE COURT OF APPEAL

[6] The Court of Appeal allowed the appeal and made an order in terms of prayer (1) of the notice of motion but only in respect of the letter of appointment, not the other documents soughtfor in it and in prayer (2).

[7] The reasons for aforesaid decision are these:

(a) the letter of appointment of Datuk Hj Sulaiman did not fall within the scope of that s 126 as the same cannot be treated as solicitor-client communication;

(b) the learned judges found that the respondent has a legitimate interest or expectation to have sight of the letter appointing premised on the fact that our criminal justice system is an adversarial one and the duty of a prosecutor to act fairly is paramount; and

(c) the letter of authorisation of Datuk Hj Sulaiman falls within the ambit of s 55 of the Evidence Act 1950 and s 129 of the Criminal Procedure Code.

OUR DECISION

[8] We start off with the basic premise that the respondent's motion in substance is not to challenge the validity of the appointment of Datuk Hj Sulaiman but only for the production of the letter of appointment. That was the views of the High Court and the Court of Appeal. There is no challenge by the respondent of this finding by way of cross-appeal.

[9] It is also undisputed that the appellant, being the public prosecutor, possess the sole constitutional power to institute and conduct prosecution of all criminal cases in the country. With that power, the appellant also has the power under s 379 of the CPC to appoint private practitioner to conduct criminal prosecution on his behalf. This appointment is manifested in the letter of appointment of Datuk Hj Sulaiman.

Legitimate expectation

[10] The Court of Appeal had in para 9 of its ground found the respondent had a legitimate expectation and this was how it was put:

> Further, it is our view that since a private legal practitioner has been appointed to conduct the prosecution against the appellant, not a Deputy Public Prosecutor in the employment of the Attorney General's Chambers who is a public servant, the appellant has a legitimate interest or expectation to have sight of the letter appointing him to conduct the prosecution for it must be remembered that our criminal justice system is an adversarial one and the duty of a prosecutor to act fairly is paramount.

[11] With respect, we disagree with that finding and our reasons are these. There is no difference whatsoever in conceptual terms in the appointment of Datuk Hj Sulaiman with that of an appointment of a counsel by a private entity to act on its behalf. We don't think that can be disputed. In a private engagement of counsel by a private entity, it is obvious that an opposing party has no legitimate expectation to sight the letter of appointment of the other side though their dispute is settled via an adversarial system. To say that because the appellant happens to be a public figure, being the public prosecutor and with a paramount duty to act fairly, the respondent possess a legitimate expectation is, with respect, misconceived.

[12] Further, we have not be shown any case law which has found that in circumstances as we have here, the respondent possesses such legitimate expectation. It is trite that whether legitimate expectation exists depends the circumstances of each case and in our view the circumstances in this case is not such that there exists such right. If we concede to this view, the ramification would be this. Whenever any government or government linked companies or statutory bodies appoint private counsel to prosecute its case in the criminal or civil cases, the opposing party can then demand to see the letter of appointment just because there is some sort of public element in the appointment. In short, we are saying that unless there is a challenge to the validity to the appointment of the counsel, there exists no duty on the appointing authority or private entity to produce the letter of appointment. The 'busy body' argument has merits and apply with full force in this issue.

Section 126 of the Evidence Act

[13] The Court of Appeal found that the appointment of Datuk Hj Sulaiman is not protected by the solicitor-client communication rule. Suffice for us to say privileged communication between solicitors-client starts when discussion among the respective parties is held as to whether a particular counsel should be appointed. We adopt what was said by Lord Justice Scrutton

in the case of *More v Weaver* [1928] 2 KB 520 at pp 522 and 524:

> ... The same absolute privilege applies to counsel. 1 suppose there are very few counsel who do not, in the course of their speeches, make defamatory statements about someone. Those statements are absolutely privileged because it is in the interest of the State that counsel should be able to speak freely without being exposed to the risk of an action at the instance of a person whose conduct he may have denounced ...
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> ... On the other hand, there is a very high authority of Lord Herschel1 in *Brown v Dunn* where he said: 'It seems to me that when communications pass between a solicitor and those who he reasonably believes will desire to retain him, and to whom he makes a communication in relation to that, and who do retain him, the whole of those communications leading up to the retainer and relevant to it, and having that and nothing else in view, are privileged communications, that the whole occasion is throughout privileged ...'.

Section 55 of the Interpretation Acts 1948 and 1967 and s 129 of the CPC

[14] In regard to the application of s 55 of the Interpretation Act and s 129 of the CPC, this is our view. Reading ss 55 of the Interpretation Act and 129 of the CPC with care, we can only discern that the public prosecutor is obliged to produce documents which are necessary to the charge prior to the commencement to prosecution. Those necessary documents in our view include sanction to prosecute, consent of the public prosecutor and authorisation to prosecute under s 129 of the CPC. How a letter of appointment of a counsel is a 'necessary' document for prosecution of a case is, with respect, hard to comprehend as it does not in any way relate to the charge preferred against the respondent. It is completely unrelated to the charge.

Academic appeal

[15] As for the submission that the fact that the appellant had complied with the order of the Court of Appeal dated 25 March 2019 makes this appeal academic. Our short answer is simply that the compliance of the Court of Appeal order was made without prejudice of this appeal and we are informed that this was made known to the respondent's counsel. This communication, with respect, was not made known to us during submission by learned counsel for the respondent. This lack of candour is to say the least disappointing. We say this with reluctance even though we are fully aware that our criminal system is an adversarial one. But as pointed out by lead counsel for the respondent, counsel are officers of the court.

[16] Finally, we find merit in the contention that the public prosecutor had himself appeared in the High Court and Court of Appeal and informed both

courts that he had appointed Datuk Hj Sulaiman as counsel assisting his prosecution team. That in our view is sufficient unless there is a challenge to the validity of his appointment.

[17] For reasons stated above, we allow the appeal of the public prosecutor and set aside of the order of the Court of Appeal and consequently reinstate the order of the High Court.

[18] This judgment is prepared pursuant to s 78(1) of the Courts of Judicature Act 1964 in view of the absence of our learned sisters, Justice Tengku Maimun bt Tuan Mat and Justice Nallini Pathmanathan.

Appeal allowed, order of Court of Appeal set aside and order of High Court reinstated.

Reported by Ahmad Ismail Illman Mohd Razali